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IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

No. 1143

MIDWESTERN UNITED LIFE INSURANCE COMPANY,

Petitioner,

vs.

TORA C. BRENNAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The Petition for Certiorari is directed to a judgment of the United States Court of Appeals for the Seventh Circuit, affirming a judgment of the United States District Court for the Northern District of Indiana. The Respondent, Mrs. Tora C. Brennan, filed a class action alleging that the

Petitioner (hereinafter "MULIC") aided and abetted Dobich Securities Corporation (hereinafter "Dobich Securities") in violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78j(b), and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. Sec. 240. 10b-5.

The District Court found for the Respondent, in a memorandum opinion that contains detailed findings of fact and conclusions of law. 286 F. Supp. 702 (1968) (App. 25-86). The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court. 417 F. 2d 147 (1969) (App. 87-115).

Jurisdiction

The Petitioner is invoking the jurisdiction of this Court under 28 U.S.C. Sec. 1254(1). As set forth in Rule 19 of the Supreme Court of the United States, "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Questions Presented

1. Do Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission impose a duty upon a corporation whose stock is held by public investors to refrain from aiding and abetting a broker who is known to be engaged in fraudulent practices, for the purpose of gaining a benefit for itself?

2. Did the Court of Appeals err in concluding that there was ample evidence that the corporation facilitated the broker's fraud, that the findings of the District Court were not clearly erroneous, and in applying the "clearly erroneous" test to those findings?

Statute and Rules Involved

The pertinent provisions of the Securities Exchange Act of 1934, Rule 10b-5 of the SEC, and Rule 52 of the Federal Rules of Civil Procedure are set forth in the Petition at Pages 3 and 4.

STATEMENT OF THE CASE

This case began in November of 1965 when Tora C. Brennan brought a class action for damages against MULIC. The Plaintiff contended that she and the members of the class had been defrauded by Dobich Securities, a brokerage firm engaged in a fraudulent course of conduct in violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. The Plaintiff also contended that MULIC had aided and abetted the fraud for the purpose of gaining a benefit for itself and its officers and directors. (A. 5*)

Dobich Securities and its 26 commission salesmen sold only MULIC stock from June of 1964 until July of 1965. The salesmen went from door to door and from farmhouse to farmhouse in Indiana selling MULIC stock the way others sell brushes. (A. 292-93)

The firm was insolvent during this entire period, and engaged in short sales of MULIC stock by selling shares which it did not own or have the ability to purchase. Monies paid Dobich Securities for the purchase of MULIC stock were used for stock and commodity speculations, for office expenses and for covering prior short sales. In short, Dobich Securities robbed Peter to pay Paul. (A. 375, 377)

Between May of 1964 and July of 1965 Dobich Securities delivered 48,409 shares of MULIC stock. During the same period and before the firm filed a voluntary petition in bankruptcy, Dobich Securities customers paid approxi-

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* "A. —" refers to the appendix filed in the Court of Appeals. "App. —" refers to the appendix filed in this Court with the petition. "R. —" refers to the record on appeal.

mately $2,900,000.00 for 36,000 shares of MULIC stock which will never be delivered. (A. 294)

MULIC is a publicly held corporation. During the period pertinent to this action, it had 1,000,000 shares of stock outstanding (A. 561) and over 10,000 stockholders. (A. 630) Some of its stock was registered with the SEC. (A. 64) Its stock was quoted daily in the Wall Street Journal and other financial publications, and traded on the over-the-counter market.

MULIC's petition does not comply with Rule 40(1)(e) of this Court in that its Statement of the Case does not contain "all that is material to the consideration of the questions presented." The following is a summary of the evidence on which the District Court and the Court of Appeals held MULIC had aided and abetted the Dobich Securities violation of § 10(b) and Rule 10b-5, and which MULIC's Petition fails to disclose.

Events Preceding the MULIC Decision to Aid and Abet Dobich Securities

Philip Schwanz, MULIC's president, and Ralph Sheets, MULIC's counsel and assistant secretary, were the officers of MULIC who caused the company to aid and abet Dobich Securities. In May of 1964 they learned that Dobich Securities intended to sell MULIC stock on an exclusive basis and was predicting the price of MULIC stock would go from $65.00 to $135.00 per share within six months. They also learned that Dobich Securities was using false rumors of a merger as part of its sales technique. (A. 72)

It was while acting as its own transfer agent and registrar that MULIC obtained knowledge of the nature and extent of the activities of Dobich Securities. During August

and September of 1964 MULIC received complaints or what Schwanz and Sheets considered "quite a number of occasions" from persons who had not received delivery of MULIC stock purchased from Dobich Securities for periods ranging from six weeks to four months. The amounts involved ranged from $2,000 to $50,000. (A. 82-87)

Schwanz and Sheets knew something was amiss and wrote a letter on September 28, 1964, to Michael Dobich, the president of Dobich Securities, in which they said, "*It appears that you are using your clients' money as working capital, which should not be done.*" The letter threatened to report Dobich Securities to the Indiana Securities Commission if any future complaints of non-delivery came to MULIC's attention, and concluded by expressing concern for its solvency:

> "Mike, we do not want to cause you any trouble; but if, for some reason, your firm should be unable to make good on its obligations to transfer MULIC stock after your clients have paid for it, they might feel that MULIC is somehow responsible. We do not want this to happen.
>
> If there is some reasonable explanation for these delays, please let us know." (A. 90)

Dobich responded on October 2, by writing Schwanz and Sheets that Dobich Securities had developed a "substantial interest" in MULIC stock and requesting a meeting with them. Then on October 6 Schwanz and Sheets learned of another complaint of non-delivery, involving $7500 paid by the investor some three months earlier, and they again wrote Dobich asking for an explanation. (A. 91-94)

Dobich, Schwanz and Sheets met at MULIC's home office in Fort Wayne, Indiana on October 12, 1964. Dobich was killed before Plaintiff brought this action and could tell

no tales. The tale Schwanz and Sheets told was that Dobich said he was not "short in his accounts," he always had stock to cover his sales but the bank which held the stock as collateral and other brokers were slow in getting it to him, and he was pushing the sale of MULIC stock. (A. 473, 578-79)

Schwanz and Sheets testified they believed everything Dobich said *except* that he was selling a lot of MULIC stock! Nevertheless, they agreed to give him two weeks "to get even with the board," and confirmed the agreement in a letter dated October 13 in which they stated MULIC would refer any complaints of non-delivery received after the two week period to the Indiana Securities Commission "for suitable investigation." (A. 95, 477-78, 580-81, 638)

On October 15 Schwanz and Sheets knew to a certainty Dobich had lied to them and that Dobich Securities was making misrepresentations to its customers to excuse its consistent failure to deliver MULIC stock within a reasonable time. One such customer reported that day he had been told he wouldn't get his stock for "a while" because Dobich Securities "did not want to flood the market" with MULIC stock. (A. 99) Another customer reported he was told "the stock was in inventory and any delay in its delivery would be the fault of MULIC." (A. 98)

These representations were false and Schwanz and Sheets knew it. They admitted they knew that Dobich Securities could hardly "flood the market" by presenting

shares for transfer and that MULIC was not responsible for the delay in delivery. (A. 482, 585-86)

A third person who complained that same day that he had paid an *unnamed* broker four months before for undelivered MULIC stock was advised by MULIC to contact his broker; MULIC sent Michael Dobich a blind carbon copy of MULIC's letter to the complaining customer even though the customer had not identified the broker involved. (A. 96-97) The fact was that Dobich Securities was the broker involved, and MULIC knew it, because MULIC *never* received such complaints about any other broker. (A. 404)

The blind carbon copy, of course, served two purposes. It confirmed MULIC's agreement to give Dobich Securities two weeks to "get even with the board" and it kept the complaining customer from knowing that he was the subject of a MULIC-Dobich Securities cooperative effort.

The Effect of the Activities of Dobich Securities on the Price of MULIC Stock

Dobich Securities did not sell MULIC stock prior to June of 1964. (A. 292) Thereafter Schwanz observed that Dobich Securities was "doing a better job than any other Indiana broker." (A. 612) In point of fact Dobich Securities sold more MULIC stock than any other broker in the United States, and only Merrill Lynch delivered more. (A. 299) The following shows the extent to which the price of MULIC stock increased in 1964 when Dobich Securities

went into the market to cover some short sales. (R. 525-726, A. 331)

Month	MULIC Shares Presented For Transfer by Dobich Securities	MULIC Shares Presented For Transfer by All Others	High Bid Price Per Share	Low Bid Price Per Share
May, 1964	-0-	13,941	—	—
June	478	18,307	$69.00	$65.00
July	2,725	13,965	81.00	69.40
August	884	12,944	79.00	75.00
September	3,381	15,217	81.40	79.00
October	4,515	13,341	89.00	80.00
November	5,549	19,494	90.00	86.00
December	4,671	14,760	93.00	87.00
January, 1965	4,099	6,192	91.40	86.00

There was ample evidence that there was a thin market for MULIC stock and that Dobich Securities caused the market to go up when it covered short sales. Several brokers who made a market in MULIC stock, including one who furnished daily quotations for the Wall Street Journal, so testified. MULIC earned 30¢ per share in 1964. This was considerably less than the company had earned in 1963. When Dobich Securities drove the price up to $90.00 per share, the stock was selling at 300 times earnings! (A. 290-292, 597, 680-90)

Schwanz has admitted he knew that Dobich Securities was inflating the price of MULIC stock when the firm went into the market to cover some of its short sales. He also testified that a corporation is in a better position to negotiate mergers when its stock increases in price, and he wasted no time negotiating one. (A. 605, 608, 635)

The two-week period MULIC gave Dobich to get "even with the board" had ended by October 28, 1964. On that

date Schwanz negotiated an agreement for the merger of Illinois Mid-Continent Life Insurance Company (hereinafter "IMC") into MULIC. The agreement provided that IMC shareholders would receive one share of MULIC stock in exchange for ten shares of IMC. (A. 249)

The 10-for-1 exchange ratio was based primarily on prevailing market prices. The IMC stock was being quoted at $9.50 per share and MULIC at $88.00. The adjusted book values of the two corporations supported ratios ranging from 4.59-to-1 to 5.87-to-1, depending upon the calculation method used. (A. 247-58, 269, 599)

The proposed merger was vigorously contested in the courts by the IMC shareholders promptly after it was announced. They filed suit on November 10, and a bitter and lengthy proxy fight ensued. MULIC relied exclusively on the market prices of the stocks in its efforts to defend the propriety of the merger. The IMC stockholders were told, "The adjusted book value of the shares has little relationship to the value of the shares in that the value of the shares is primarily established by the market value in over-the-counter trading." The IMC shareholders, however, did not believe that the prevailing market price of MULIC stock truly reflected its value and on February 4, 1965, voted the merger down. (A. 251, 259-74, 285, R. 1013)

Schwanz admitted that it would have been embarrassing for MULIC if the SEC or the Indiana Securities Commission had investigated Dobich while the proxy fight was in progress. (A. 645-646) He also admitted that if Dobich Securities had been put out of business in November or December of 1964, there could have been a serious decline in the price of MULIC stock. (A. 646)

Such a decline, of course, would have deprived MULIC of its sole merger selling point with the IMC shareholders.

It would have deprived MULIC of a merger selling point with the shareholders of Great Northern Life Insurance Company for a merger which was proposed shortly after the IMC merger fell through, and which was consummated after Dobich was killed. It would also have deprived the MULIC insiders of the substantial profits they made upon selling over $500,000.00 worth of MULIC stock. (A. 236-37, 626, 777, 812, 820)

MULIC Begins Aiding and Abetting Dobich Securities to Maintain the Inflated Price for Its Stock

In late November of 1964, while the proxy battle was being fought, MULIC learned that Dobich Securities was not going to keep its part of the October 12 bargain. MULIC received two more complaints of non-delivery and was called upon to make a very important decision concerning Dobich Securities. (A. 106, 587-89, 665-72)

MULIC had assured Dobich that it would refer one more such complaint to the Indiana Securities Commission. However, the proxy fight and MULIC's need to maintain the inflated price for its stock produced a change of heart.

When Robert E. Dillon notified a MULIC agent on November 23, that he had purchased $16,400 worth of stock on September 10, and had failed to receive delivery, Schwanz and Sheets changed their course completely. (A. 666-672) By letter of November 30, they notified Dobich of the complaint and that the customer was being advised to contact his attorney or the Commission in the event that Dobich Securities didn't come up with the customer's stock or an explanation for non-delivery. Schwanz and Sheets knew the sort of explanation Dobich gave his customers. (A. 104-05)

The second complainant, Frederick E. Volkee, was given the same letter advice on December 1, and Dobich was alerted to the complainant's identity by means of a blind carbon copy of the letter. (A. 106-07)

Schwanz admitted that the adoption of this procedure for dealing with complaints from Dobich customers created an avenue for Dobich whereby he could make delivery to persons who were likely to cause him trouble and thereby avoid trouble. (A. 596) Dobich got the message that MULIC was not only no longer a threat to him but was going to keep him in business by identifying those customers sophisticated enough to complain. He promptly delivered shares to MULIC for transfer to the two complainants. Therefore until shortly before his death Dobich delivered shares to MULIC for transfer to others who contacted MULIC and were referred back to him. (A. 80-81)

Schwanz and Sheets never wavered from their decision to help Dobich. From and after November of 1964 until the day Dobich crashed his helicopter in July of 1965, MULIC acted as a lookout and systematically referred complaining Dobich customers back to Dobich so that Dobich could make delivery, stay in business and continue to keep the price of MULIC stock at artificially high levels. (A. 101-160) As late as June 29, 1965, Sheets told one farmer's wife to "threaten to prosecute but not go through with it." (A. 703)

Schwanz and Sheets, of course, did not wish to publicize the MULIC-Dobich relationship. Blind carbon copies were used on some occasions. On another, when Schwanz and his associates were laughing about the fact that Dobich had inflated the price of MULIC's stock by flying around in his helicopter and selling it to the farmers, Schwanz falsely stated that he had never met Dobich. (A. 683-84)

The Calculated Risk

MULIC decided to aid and abet the Dobich Securities fraud because it was to MULIC's advantage to do so, and because Schwanz and Sheets didn't think the risk of harm to MULIC was great. Schwanz testified that he calculated MULIC's exposure was no more than 1000-1500 shares in the event Dobich Securities went into bankruptcy, "and that could be cleared up very easily." (A. 611-13) Schwanz erred. After Dobich's death Schwanz told a caller, "I've considered shutting him off and not letting him operate", and "If the guy had lived, he might have pulled it off." (A. 873-74)

This case, contrary to MULIC's Statement of the Issues Presented (Pet. p. 2), clearly involves neither a corporation which had "no connection or relationship with the broker," nor one that was held liable solely for a failure to report the broker's activities to the SEC or a state regulatory commission.

The Trial Court held that MULIC was liable as an aider and abettor for acting as a lookout for Dobich. The trial court also stated:

> ". . . it has not been necessary to the holding of the court to decide whether mere 'silence and inaction' under the unusual circumstances of this case constituted aiding and abetting which caused the alleged damages. However, since under the evidence and the law the defendant's failure to report [to the regulatory agencies] would constitute an independent basis of recovery and the parties have extensively briefed this question, it has been given consideration in this opinion." (App. 27)

The Trial Court held in the alternative that MULIC was liable under the facts and circumstances of this case for

failing to report Dobich's activities to the SEC or the Indiana Securities Commission. (App. 99)

The Court of Appeals held that MULIC was liable as an aider and abettor for its affirmative wrongdoing in acting as Dobich's lookout and for its purposeful silence. The court felt it unnecessary to decide whether MULIC could be held liable for a failure to report if its silence had not been for the purpose of obtaining and maintaining an artificial buildup in the market for its stock, and had not been accompanied by its affirmative misconduct:

> "It is our view that the district court was correct in concluding that Midwestern's acquiescence through silence in the fraudulent conduct of Dobich *combined with its affirmative acts* was a form of aiding and abetting cognizable under Section 10(b) and Rule 10b-5 . . . . Without deciding whether the failure to report Dobich's activities to the Indiana Securities Commission would *in itself* give rise to liability under Rule 10b-5, we find that under all the facts and circumstances of this case, Midwestern's actions amounted to a tacit agreement with Dobich to prevent complaints from reaching the Commission, thus facilitating the fraud and allowing Dobich's scheme to continue to Midwestern's benefit." (App. 101-02) (Emphasis added.)

The Court, in addition, made no error with respect to the burden of proof, had ample support in the record for its decision, and applied the proper standard of review.

ARGUMENT

REASONS FOR DENYING THE WRIT

I.

The Case Presents No Novel or Far Reaching Questions

The decision of the Court of Appeals presents no questions for review by this Court. MULIC has therefore concocted questions for review which ignore the decision of the Court of Appeals and the facts of this case.

The Court of Appeals did not hold MULIC liable solely for a failure to report its knowledge of Dobich's activities to regulatory agencies, as MULIC tells this Court. (Pet. p. 11) The Court of Appeals held that MULIC's affirmative conduct in acting as a lookout for Dobich, combined with MULIC's calculated silence and its purpose to gain a benefit for itself rendered MULIC liable as an aider and abettor. (App. 101-02)

The Court properly refrained from deciding whether MULIC could be liable if its failure to report were isolated from all of the other unique facts and circumstances of this case. It is clear beyond dispute that MULIC's affirmative conduct, without regard to its failure to report, renders it liable here as an aider and abettor.

MULIC's assertion that it had no knowledge Dobich was defrauding his customers is in conflict with the evidence, to say the least. MULIC had complete knowledge by October 15, 1964.

MULIC knew that Dobich was wrongfully using his customers' money as working capital. MULIC knew that

Dobich Securities was "unable to make good on its obligations to transfer MULIC stock" to customers who had paid for it months before. MULIC knew that Dobich was making flagrantly false representations to excuse his inability to deliver. MULIC knew that the "substantial interest" Dobich Securities was creating in its stock put MULIC in an unusually good merger position and allowed its insiders to sell at inflated prices.

MULIC chose to help Dobich from November of 1964 until July of 1965 in order to maintain its Dobich-created merger position and insider profits. MULIC identified for Dobich potential troublemakers whose stock should be delivered. MULIC kept those persons away from the SEC and the Indiana Securities Commission. MULIC helped Dobich conceal the fraud.

Such conduct has always rendered one an aider and abettor and liable as a principal. 22 C.J.S., *Criminal Law*, § 86(b), 88(2); 86 C.J.S., *Torts*, §33. And Congress, of course, has granted aiders and abettors no immunity from liability under the Securities Laws. *Carroll v. First National Bank of Lincolnwood*, 413 F.2d 353, 357 (7th Cir. 1969) cert.den. 1-12-70, Dkt. 651; *Buttrey v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 410 F.2d 135 (7th Cir. 1969) cert.den. 10-13-69 Dkt. 341; *Anderson v. Francis I. duPont & Co.*, 291 F.Supp. 705, 709 (D. Minn. 1968); *Fischer v. Kletz*, 266 F.Supp. 180, 190 S.D.N.Y. 1967); *Ross v. Licht*, 263 F.Supp. 395, 410 (S.D. N.Y. 1967); *Pettit v. American Stock Exchange*, 217 F.Supp. 21, 28 (S.D.N.Y. 1963); *SEC v. Scott Taylor & Co.*, 183 F.Supp. 904 (S.D.N.Y. 1959); *Hawkins v. Merrill Lynch, Pierce, Fenner & Beane*, 85 F. Supp. 104, 121 (W.D.Ark. 1949); *SEC v. Timetrust, Inc.*, 28 F.Supp. 34, 43 (N.D.Cal. 1939) app. dismd. 118 F.2d 718 (9th Cir. 1941).

The effectiveness of MULIC's aiding and abetting is demonstrated by the fact that not one complaint reached the SEC about Dobich until the day before he died, only one person of the many who contacted MULIC subsequently contacted the Indiana Securities Commission, and not one customer lawsuit was filed against Dobich before he died. (A. 213, 324)

It should also be noted that contrary to its assertions, MULIC's liability is nowhere near 30% of its net worth.* The sum necessary to satisfy the judgment has long since been set aside by MULIC, and counsel have stipulated the validity of the great majority of the class members' claims. In addition, we are confident that the loss here will be borne by Schwanz, Sheets and other MULIC insiders who took a calculated risk in helping Dobich. The innocent MULIC shareholders about whom such concern is now expressed (Pet. p. 14) will no doubt feel that their corporation is entitled to indemnity.

There is nothing novel or far reaching in the decision of the Court of Appeals. The case below clearly turned on its unusual facts and not upon any unsettled principles of law. This Court, of course, does not grant a writ of certiorari to review such a case. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

*** The value of an insurance company is determined by many formulas; MULIC's statutory net worth of $6,000,000 in November 1964, was translated into book value of from $17,000,000 to $23,000,000, and blown up to $90,000,000 of alleged market value for purposes of the IMC merger. (A. 257-258, 595)**

II.

THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT AND THE REMAINING POINTS RAISED BY THE PETITION PRESENT NO QUESTIONS FOR REVIEW

The petition provides a classic example of the lengths to which a twice defeated party will go to seek a third hearing. MULIC has already had two full and fair hearings. Preoccupied with its desire to avoid liability for the wrongdoing of its insiders, MULIC has neglected the facts of this case and the law applicable thereto.

A.

The Burden of Proof was Properly Placed

The District Court applied the "but for" standard of causation and held that Plaintiff had met her burden of proof. MULIC sought to apportion the harm between itself and Dobich and the Court placed the burden of apportionment upon MULIC in accordance with Restatement, *Torts 2d*, § 433B, *Davis v. Garrett*, 6 Bing. 716, 724, 130 Eng. Reps. 1456, 1459 (C.P. 1830) and Judge Clark's opinion in *Baird v. Franklin*, 141 F.2d 238 (2nd Cir. 1944) cert.den. 323 U.S. 737 (1944).

Mrs. Brennan clearly met the burden that would have been imposed upon her if this were a negligence action. However, she was not required to prove that "but for" the aider and abettor's conduct the harm would not have occurred. The Plaintiff was only required to prove that the conduct of MULIC facilitated Dobich's wrongdoing. 22 C.J.S., *Criminal Law*, § 88, p. 264, 15A C.J.S., *Conspiracy*, § 18, p. 658; and the opinion of the Court of Appeals so holds. (App. 100, 102)

The trial court's application of the more stringent "but for" standard of causation, of course, did not require that the Court of Appeals disturb the judgment on appeal. *Brown v. Allen*, 344 U.S. 443, 459 (1953); *SEC. v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *Riley Investment Company v. Commissioner*, 311 U.S. 55, 59 (1940).

The Courts below properly found that the acts of MULIC were the legal cause of the loss suffered by Respondent and other members of her class. It is clear under the facts of this case that MULIC facilitated the Dobich fraud. MULIC's conduct was therefore a proximate cause of the loss.

A similar question of proximate cause was raised in the case of *Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F. 2d 135 (7th Cir. 1969) *cert. den.* 10-13-69 Dkt. 341. In that case, which is almost a companion to this one, it was alleged that Merrill Lynch violated Rule 405 of the New York Stock Exchange in permitting Dobich Securities to operate on a speculative basis without furnishing financial statements or bank references or credit reports as the Rule required. One of the issues on appeal, when a motion for summary judgment was denied, was the contention by Merrill Lynch that its alleged violation of Rule 405 did not proximately cause the losses incurred by Dobich. The Court of Appeals held that the result of Merrill Lynch's disregard of Rule 405 was to permit Dobich to use the Merrill Lynch facilities to speculate with funds converted from his customers. The Court said, ". . . the conduct of the defendants in permitting the use of the account and in failing to properly supervise it paved the way for the losses suffered by these plaintiffs." See 410 F.2d at 143 (7th Cir. 1969) *cert. den.* 10-13-69, Dkt. 341.

Similarly MULIC paved the way for Dobich to stay in business and facilitated the fraud. MULIC helped Dobich by identifying the complaining customers. MULIC helped him conceal his fraud by heading off complaints that would have reached the authorities. MULIC helped him enable the squeaky wheel to get the grease (A. 559, 648). In other words, MULIC acted as the lookout, while the continuing series of robberies took place.

B.

The Decision Below is Based Upon Substantial Evidence

The evidence upon which the District Court based its findings is set forth in the Court's exhaustive Memorandum of Decision (App. 25-86). The evidence of MULIC's knowing participation in the Dobich fraud is overwhelming.

No one can recreate the full flavor of a trial of a case. The printed page does not convey the facial expressions of the witnesses, the inflections in their voices, the varying speeds of their speech, the pauses in their answers.

The trial judge saw and heard the witnesses. He had to judge their credibility. He examined the documents and heard what the witnesses said about them. His findings of fact and the inferences he drew from the evidence were properly given great weight by the Court of Appeals.

C.

The Trial Court Drew No Crucial Inferences from Undisputed Facts

The fact that some Courts of Appeal have held that Rule 52(a) does not apply where the evidence before the

District Court was undisputed is wholly irrelevant here. The evidence in this case was hardly undisputed.

The MULIC insiders told one story during the lengthy trial of this case, while other witnesses told another. The meaning of the documents from MULIC's files was sharply disputed, and the insiders were questioned at length about them.

The Trial Judge was required to determine whether Schwanz and Sheets were fools or knaves. He was also required to determine from conflicting evidence knowledge, motive, design, and the intent with which men acted. Such findings depend particularly upon the trial court's credibility appraisals. *United States v. Oregon State Medical Society,* 343 U.S. 326, 331-332 (1952); *United States v. Yellow Cab Company,* 338 U.S. 338, 341 (1949).

MULIC's statement (Pet. p. 19) that it does not challenge any findings on credibility or disputed evidence is simply incredible. All of the findings essential to a judgment for the Plaintiff, including the finding that MULIC knowingly participated in the Dobich fraud, were based upon evaluations of credibility and disputed evidence. (App. 25-86) Petitioner's statement of the case clearly challenges those findings.

Finally, MULIC's assertion that the Court of Appeals applied the standard of review applicable to jury verdicts is clearly without merit. The Court properly concluded that there was substantial evidence in the Record to support the findings of the trial judge and that those findings were not clearly erroneous. (App. 88-90) *United States v. United States Gypsum Co.,* 333 U.S. 364, 394-95 (1948); *United States v. Yellow Cab Co.,* 338 U.S. 338, 341-42 (1949); *United States v. Oregon State Medical Society.* 343 U.S. 326, 331-332 (1952).

CONCLUSION

This Court does not issue a Writ of Certiorari to give a twice-defeated party a third opportunity to argue either the sufficiency of evidence or abstract points of law that have no relation to the evidence. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923), *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959).

The Writ should be denied.

Respectfully submitted,

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